Supreme Court, U.S.
FILED

No. 94 408 SEP 6 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

REDWOOD VILLAGE PARTNERSHIP,
an Illinois Partnership,

Petitioner,

v.

JOHN GRAHAM, BLAINE NORDWELL, ROBERT WANNER, BARB HOWE, DON JOHNSON, AND CHARLES ERHHARDT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ERWIN CHEMERINSKY
UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER
University Park
Los Angeles, CA 90089
(213) 740-2539

LAROY BAIRD
322 East Main, 2nd Floor
P.O. Box 913
Bismarck, N.D. 58502
(701) 223-6400

PAUL HOFFMAN*
100 Wilshire Blvd.
Suite 1000
Santa Monica, CA 90401
(310) 260-9585

ELLIOTT SIMON
One East Wacker Dr. #3622
Chicago, IL 60601
(312) 329-0626

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

43 pp

QUESTIONS PRESENTED

I.

Are executive officials engaged in administrative rule-making and rate-setting entitled to the absolute immunity from suits for money damages accorded to legislators?

II.

If executive officials engaged in administrative rule-making and rate-setting are accorded absolute immunity, should such immunity apply to rules that intentionally have a particularized impact and affect only one entity?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinion Below 1

Jurisdiction 2

Relevant Constitutional and Statutory Provisions ... 2

Statement of the Case 3

Reasons for Granting the Writ 8

I. This Court Should Resolve a Split Among the Circuits Concerning Whether Executive Officials Engaged in Rule-Making and Rate-Setting Are Entitled to Absolute Immunity 8

II. This Court Should Decide the Important Question as to Whether Rules With a Particularized Impact Should Be Regarded as Legislative ... 20

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES:

Antoine v. Byers & Anderson, Inc., 113 S.Ct. 2170 (1993) 11, 12, 16

Barr v. Mateo, 360 U.S. 564 (1959) 16

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) 21

Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993) 10, 11, 18

Burns v. Reed, 111 S.Ct. 1934 (1991) 10, 11, 12, 18

Butz v. Economou, 438 U.S. 478 (1978) 16

Cinevision Corporation v. City of Burbank, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) 21

Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984) 20

Dombrowski v. Eastland, 387 U.S. 82 (1967) 17

Forrester v. White, 484 U.S. 219 (1987) 10

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10

Hughes v. Tarrant County, Texas, 948 F.2d 918 (5th Cir. 1991) 21

Imbler v. Pachtman, 424 U.S. 409 (1976) 12

Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) 8, 9

Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 14, 15

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 10

O'Brien v. City of Greers Ferry, 873 F.2d 1115 (8th Cir. 1989) 20

TABLE OF AUTHORITIES – Continued

Page

Owen v. City of Independence, 445 U.S. 622 (1980) 18

Procunier v. Navarette, 434 U.S. 555 (1978) 10

Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984)..... 10

Redwood Village v. North Dakota Department of Human Services, 420 N.W.2d 333 (N.D. 1988) 5, 21

Stump v. Sparkman, 435 U.S. 349 (1978).....10, 15

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 15, 19

Tenney v. Brandhove, 341 U.S. 367 (1951).....10, 17

Tower v. Glover, 467 U.S. 914 (1984)..... 18

Walter v. Torres, 917 F.2d 1379 (5th Cir. 1990).....8, 9

United States v. Johnson, 383 U.S. 169 (1975) 17

Yeldell v. Cooper Green Hospital, Inc., 956 F.2d 1056 (11th Cir. 1992)..... 21

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. XIV 2

STATUTES CITED:

5 U.S.C. §553..... 13

42 U.S.C. §1983..... 2, 7, 11, 15, 18, 19

TABLE OF AUTHORITIES – Continued

Page

NORTH DAKOTA ADMINISTRATIVE CODES:

N.D.A.C. §75-02-07-04 5

N.D.A.C. §75-02-07-04(7) 21, 22

N.D.A.C. §75-02-07-04(8) 6, 22

N.D.A.C. §75-02-07-05(1)(a)(7) 6

OTHER AUTHORITIES:

F. Heffron, *The Administrative Regulatory Process* 1 (1983) 13

S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 399 (1979) 13

2 S. Nahmod, *Civil Rights and Civil Liberties Litigation*, 96 (3d ed. 1991) 15

No. _____

In The

Supreme Court of the United States

October Term, 1994

REDWOOD VILLAGE PARTNERSHIP,
an Illinois Partnership,

Petitioner,

v.

JOHN GRAHAM, BLAINE NORDWELL, ROBERT WANNER, BARB HOWE, DON JOHNSON, AND CHARLES ERHHARDT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Redwood Village Partnership, an Illinois Partnership, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case entered on June 9, 1994.

OPINION BELOW

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioner's lawsuit on

the grounds that defendants were entitled to absolute immunity. A copy of the court's decision is attached in the Appendix to the Petition at pp. 1-9. A copy of the district court's decision dismissing the lawsuit on absolute immunity grounds is attached in the Appendix to the Petition at pp. 10-19.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioner's lawsuit on June 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend XIV:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This suit seeks money damages from executive officials who adopted administrative rules and rates that in their retroactive effect were applicable only to the petitioner, Redwood Village Partnership (hereafter, "Redwood"). Redwood operated a basic care nursing facility in North Dakota. After Redwood successfully challenged the rates imposed on it in the North Dakota Supreme Court, respondent government officials adopted new rules with retroactive effect which applied solely to Redwood. These new rules made it economically impossible for Redwood to continue operating the facility and consequently it was sold at a significant loss. Petitioner contends that the enactment of these rules with particularized retroactive effect solely on Redwood violates the guarantees of due process and equal protection found in the Fourteenth Amendment to the United States Constitution.

Redwood Village, Inc. was a basic care facility located in Wilton, North Dakota. The facility was sold to the Redwood Village Partnership, Ltd., on December 31, 1984. (App. at 2). The partnership was formed solely for the purchase of this basic care facility. After obtaining the facility, Redwood applied for reimbursement of supplemental security benefits from the State for the period

from July 1, 1985 through June 30, 1986. In seeking reimbursement, Redwood used its actual cost of purchasing the facility to determine the rate at which it should be reimbursed. Under this approach, Redwood determined its allowable costs to be $383,649 and requested reimbursement at a rate of $687 per month per eligible resident.

The Department of Human Services (hereafter, "Department") disagreed and concluded that in determining reimbursement rates the standard should be what a "prudent and cost conscious buyer" would have paid for the facility and not the actual cost. (App. at 3). The Department set the allowable costs at $316,968, which resulted in a reimbursement rate of $607 per month per eligible resident.

Redwood requested and received an administrative hearing. The hearing officer agreed with Redwood that under the Department's rules, reimbursement should be based upon the actual purchase price rather than what the prudent and cost conscious buyer would have paid. The Department, however, rejected the hearing officer's conclusion and adopted the "prudent and cost conscious buyer" standard and allowed the $607 reimbursement rate. (App. at 3-4).

Redwood appealed to the North Dakota District Court and the District Court ruled in favor of Redwood. The District Court's findings were essentially the same as the hearing officer's conclusions and the court concluded that the Department's findings were not supported by a preponderance of the evidence and remanded the matter

to the Department. The Department appealed to the Supreme Court of North Dakota.

The North Dakota Supreme Court ruled in favor of Redwood and allowed it a reimbursement rate of $685, almost exactly what it initially requested. *Redwood Village v. North Dakota Department of Human Services*, 420 N.W.2d 333 (N.D. 1988). The Supreme Court concluded that although the Department could have found the cost of purchase to be only $530,000, rather than the $722,000 actually paid by Redwood, the Department had miscalculated the allowable interest cost that could be considered in determining the reimbursement rate. Specifically, the Court found that the allowable interest cost was $502,000, not the $230,800 asserted by the Department, thus justifying the higher reimbursement rate.

Following the North Dakota Supreme Court's decision, the Department promulgated new rules regarding the reimbursement rates to be paid to basic care facilities. These rules, in large part, were motivated by a desire to overturn the North Dakota Supreme Court's ruling in favor of Redwood. Three of these regulations are the source of the action brought by Redwood against the respondents.

Section 75-02-07-04 of the North Dakota Administrative code, which addresses depreciation, specifies that as to the purchase of a facility and its depreciable assets as an ongoing operation, the allowable depreciation on sales on or after July 18, 1984, would be determined by the seller's cost basis less accumulated depreciation plus recaptured depreciation. Although the regulation was

adopted on July 1, 1989, it was made retroactive to facilities purchased after July 18, 1984. (App. at 3-4). Only one basic care facility was sold during this period between 1984 and 1989: Redwood. It is this particularized retroactive effect that Redwood is challenging. Redwood is treated differently from all others who owned facilities between 1984 and 1989. All others use their own cost basis in calculating depreciation; Redwood, alone, had to use the cost basis of the previous owners.

The second regulation at issue is section 75-02-07-04(8), which provides that if an operator sells an asset, or removes it from service, any depreciation costs asserted after June 1, 1984, may be recaptured to the extent the sale exceeds the underappreciated value. Although the regulation was not adopted until 1989, it was made retroactive to 1984. (App. at 3-4). Only one facility would have to pay back all of the depreciation costs it had previously asserted if it was sold after July 1, 1989: Redwood Village. In fact, no other basic care facility in North Dakota had been sold in the past 25 years. Most, if not all, of the facilities in the State already had fully depreciated their major assets and would not be affected by the regulations. Even if some were still depreciating assets, most of the depreciation would have been asserted before June 1, 1984, and would not be subject to recapture. Redwood Village clearly suffered the most from the regulation.

The third regulation specifically was intended to overturn the North Dakota Supreme Court's decision in favor of Redwood. Regulation 75-02-07-05(1)(a)(7) stated that the allowable interest on facilities bought on or after

July 18, 1984, is limited to the interest cost the facility would have reported had it not changed ownership. (App. at 3-4). The regulation thus retroactively changed Redwood's allowable interest costs.

The result of these regulations would have been a change from a positive cash flow of $3,500 per month to a negative cash flow of the same amount. In order to avoid this effect, Redwood sold the facility back to the previous owners at a significant loss before the effective date of the regulations. Indeed, if Redwood had waited before selling the facility it would have had to pay the recaptured depreciation if it later changed the use of the facility, closed it, or sold it.

Redwood then brought this lawsuit to recover for the violation of its constitutional rights, pursuant to 42 U.S.C. § 1983. The action was brought against the named defendants in their individual capacity as they were all employees of the Department of Human Services and were involved in the promulgation of the regulations.

The United States District Court, on April 27, 1993, dismissed the lawsuit on the grounds that the defendants are entitled to absolute immunity. On June 9, 1994, the United States Court of Appeals agreed and concluded that defendant's were protected by absolute immunity.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve a Split Among the Circuits Concerning Whether Executive Officials Engaged in Rule-Making and Rate-Setting Are Entitled to Absolute Immunity

A. A Conflict Among the Circuits Exists

There is a conflict among the circuits as to whether executive officials engaged in rule-making and rate-setting should be protected by the qualified immunity usually accorded to executive officials or whether they should be granted the absolute immunity provided to legislators. The United States Court of Appeals for the Fifth Circuit, in *Walter v. Torres*, 917 F.2d 1379 (5th Cir. 1990), held that parole board officials engaged in rule-making were performing an administrative task and therefore could not invoke absolute immunity. The court noted that the challenged activity of the parole board was directed at its "exercising a broad statutory rule making authority regarding the parole process." 917 F.2d at 1383. The court concluded: "[W]e reverse the district court's holding that the defendants were entitled to absolute immunity as to the function of rule making. Defendants in their administrative capacity possessed, instead, qualified immunity protecting them from personal liability." 917 F.2d at 1384.

In contrast, the United States Court of Appeals for the District of Columbia Circuit, in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983), held that agency officials engaged in rule-making are performing a legislative task and should be accorded absolute immunity. *Jayvee Brand* involved a suit against members of the

Consumer Products Safety Commission for losses suffered as a result of a rule banning certain substances from being used in making children's sleepwear. The court concluded that the suit was directed at the defendants' rule-making and that "when an agency exercises quasi-legislative regulatory authority, action for money damages against agency members will not lie." 721 F.2d at 395.

In this case, the United States Court of Appeals for the Eighth Circuit expressly recognized this conflict between the circuits. The court acknowledged the Fifth Circuit's decision in *Walter v. Torres*, but declared that "[w]e agree instead with the reasoning of the District of Columbia Circuit in *Jayvee Brand, Inc. v. United States*." App. at 7 (citation omitted).

Thus, there is a direct conflict among the circuits. The United States Court of Appeals for the Fifth Circuit has held that rule-making is an administrative task and executive officials engaged in rule-making should not be accorded absolute, but rather, qualified immunity. The United States Courts of Appeals for the District of Columbia and for the Eighth Circuits have held that such executive officials should be granted absolute immunity. This Court should grant certiorari to resolve the conflict among the circuits.

B. Executive Officials Engaged in Administrative Rule-Making and Rate-Setting Should Not Be Accorded Absolute Immunity

All of the respondents in this lawsuit were part of the executive branch of the North Dakota government.

Defendant John Graham was the Director of the North Dakota Department of Human Services. Defendant Blaine Nordwall was an Assistant Attorney General working within the Department. The remaining defendants were employees of the Department.

It is firmly established that executive officials generally receive only qualified immunity, not absolute immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Procunier v. Navarette*, 434 U.S. 555 (1978). The Supreme Court recently declared that "[q]ualified immunity 'represents the norm' for executive officials." *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993).

Indeed, absolute immunity is the exception to the general rule that government officials are liable if they do not act in good faith. Only a relatively few officials possess absolute immunity – judges acting in a judicial capacity, *Stump v. Sparkman*, 435 U.S. 349 (1978); prosecutors acting in a prosecutorial capacity, *Burns v. Reed*, 111 S.Ct. 1934 (1991); legislators acting in a legislative capacity, *Tenney v. Brandhove*, 341 U.S. 367 (1951); and the President of the United States when discharging the duties of the office, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The Supreme Court has taken a functional approach to absolute immunity, applying absolute immunity to the function performed and not the office. *See, e.g., Buckley v. Fitzsimmons*, 113 S.Ct. at 2613; *Forrester v. White*, 484 U.S. 219, 224 (1987); *Ray v. Pickett*, 734 F.2d 370 (8th Cir. 1984). But this Court has "emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. The

presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. 2167, 2169-70 n.4 (1993), quoting *Burns v. Reed*, 111 S.Ct. 1934, 1939 (1991). Because absolute immunity has such harsh consequences, the Court has "been quite sparing in [the] recognition of absolute immunity, and ha[s] refused to extend it any further than its justification would warrant." *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170 n.4, quoting *Burns v. Reed*, 111 S.Ct. at 1939.

In its most recent decision considering the choice between absolute and qualified immunity, the Supreme Court explained that absolute immunity only is available for those functions that would have been immune in 1871 when Congress enacted § 1983. *Buckley v. Fitzsimmons*, 113 S.Ct. at 2613. The Court stated that "[e]ven when we can identify a common-law tradition of absolute immunity for a given function, we have considered whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 cases." *Id.*

The Eighth Circuit's opinion dramatically expands the scope of absolute immunity. The Eighth Circuit would accord all executive and administrative officials, at all levels of government, absolute immunity if they are engaged in rate-setting or rule-making. Such a radical increase in absolute immunity is inconsistent with the Supreme Court's command that courts be "quite sparing" in recognizing absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170 n.4 (citations omitted). Moreover, as discussed below, neither history nor policy justifies according absolute immunity to executive officials engaged in rate-setting and rule-making. This case

presents the Court with an opportunity to clarify whether the classic administrative tasks of rule-making and rate-setting should be treated as executive or legislative in nature when there is a suit for money damages.

1. Administrative rule-making and rate-setting are historically executive tasks

The Supreme Court has emphasized an historical approach to immunity issues focusing on the "immunity historically accorded the relevant official at common law." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Burns v. Reed*, 111 S.Ct. 1934, 1939 (1991). Only those officials that were protected by absolute immunity at common law, as of 1871 when § 1983 was adopted, are entitled to claim absolute immunity today. *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170.

Neither the court of appeals nor the respondents in their briefs in the lower courts point to a single case where executive officials engaged in rule-making and rate-setting were accorded absolute immunity at common law. Quite the contrary, these are classic executive tasks and therefore are protected only by qualified immunity.

Rate-setting and rule-making, the challenged activities of the defendants, long have been tasks performed by the executive branch of government. Regulatory agencies since their inception have engaged in these tasks.

Virtually all administrative agencies, at both the federal and state level, promulgate rules. This authority is

recognized in statutes. For example, the Federal Administrative Procedures Act – the federal law controlling executive agencies – sets out procedures for rule-making. *See* 5 U.S.C. § 553. A leading Administrative Law casebook states: "Many administrative agencies are empowered to decide particular cases through adjudication and also to engage in rulemaking." S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 399 (1979). It is estimated that "at least 58 agencies at the federal level have some form of rule making authority and issue about 7,000 rules and policy statements annually." F. Heffron, *The Administrative Regulatory Process* 1 (1983).

Although rule-making shares characteristics with legislating, it is a traditional executive activity. *See* F. Heffron, *id.* at 226 ("Rule making [is] the distinctive administrative process.") Therefore, officials engaged in rule-making should be accorded qualified immunity, not absolute immunity.

Likewise, rate-setting is a core executive function protected by qualified, not absolute immunity. The very first Congress authorized the President of the United States to appoint an administrative official to "estimate the duties payable on imports." F. Heffron, *supra*, at 1. Executive agencies at both the federal and state level long have engaged in rate-setting and courts have accorded only qualified immunity to officials engaged in this executive task.

This case thus offers the Court the opportunity to clarify how lower courts should treat traditional executive tasks that have similar effects to legislation. Although administratively adopted rules and rates have

the force of law, enacting them is as much a classic executive function as adopting legislation is a classic function of legislatures.

Neither of the Supreme Court cases relied upon by respondents below decide this issue or support extending absolute immunity to executive officials engaged in administrative rule-making and rate-setting. *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), was a suit against individuals who the Supreme Court labelled "regional legislators." 440 U.S. at 405. The case involved a suit against an inter-state regional planning agency that had adopted a land use ordinance. The agency possessed and exercised the legislative power to make laws for areas within its jurisdiction. The Supreme Court's holding was that legislative absolute immunity "is equally applicable to federal, state, and local regional legislators." 440 U.S. at 405. The Court concluded its opinion by declaring: "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406.

In contrast, no one reasonably would refer to the defendants in this case as legislators. They were, at all times, executive officials. At no time were they acting in a capacity comparable to that of a state legislature. *Lake County Estates* simply did not involve executive officials in a state government who were engaged in rule-making and rate-setting. Rather, *Lake County Estates* involved a unique legislative body, a regional compact, specifically endowed with regional legislative powers.

The other case cited by respondents below, and also invoked by the court of appeals, was *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). There the Court held that the members of the State Supreme Court had absolute immunity in promulgating the State's Code of Professional Responsibility. The Supreme Court emphasized that absolute immunity existed because the State Supreme Court Justices exercised the State's *entire* legislative power in an area. *See also* 2 S. Nahmod, *Civil Rights and Civil Liberties Litigation* 96 (3d ed. 1991) ("*Consumers Union* indicated the following: State legislators and judges who exercise a state's entire legislative authority over a subject are absolutely immune from § 1983 actions.") The defendants in this case, of course, did not exercise North Dakota's entire legislative authority in this area. Also, *Consumers Union* involved the immunity of *judges* acting in a legislative capacity, not executive officials. This distinction is crucial because judges generally are protected by absolute immunity, while executive officials generally receive only qualified immunity. *See Stump v. Sparkman*, 435 U.S. 349 (1978).

Neither *Lake County Estates* nor *Consumers Union* involved according absolute immunity to executive officials engaged in the type of rule-making and rate-setting that defendants are being sued for here. Nor is there common law authority according absolute immunity to such executive tasks. Quite the contrary, because rule-making and rate-setting are classic administrative functions, qualified immunity is the appropriate standard. This case thus offers the Court the opportunity to clarify the circumstances under which executive officials should

be regarded as performing a legislative function and thereby protected by absolute legislative immunity.

2. History and policy do not support extending legislative absolute immunity to executive officials engaged in administrative rule-making and rate-setting

In determining the nature of the immunities to be accorded to specific individuals, the Court says it looks to "the immunity historically accorded the relevant official at common law and the interests behind it." *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170, quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978). An examination of the historical purposes of legislative immunity shows that it is unwarranted to extend it to executive officials engaged in administrative rule-making and rate-setting.

Chief Justice Earl Warren explained that legislative immunity traces its origins to the 17th century and a struggle between the Parliament and the Crown. *Barr v. Mateo*, 360 U.S. 564, 579 (1959). Members of Parliament claimed that their legislative activity should not be the basis for arrests or civil suits. The Bill of Rights which followed the Revolution of 1688 embodied this privilege in its declaration "[t]hat the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." W. and M. 2, c.2 (1689). This provision, of course, was the inspiration for the "Speech and Debate Clause" found in Article I, section 6 of the United States Constitution.

In *Tenney v. Brendhove*, 341 U.S. 367 (1951) – the seminal case recognizing absolute legislative immunity to § 1983 liability – the Court derived legislative immunity from the protection provided legislators in the Speech and Debate Clause of the Constitution. In *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967), the Court expressly declared: "the doctrine of legislative immunity, having its root as it does in the speech and debate clause of the Constitution."

The speech and debate clause, and analogous provisions in state constitutions, applies to legislative bodies – even to regional legislative bodies such as in *Lake County Estates*. But there is no historical basis for extending its protection to executive branch officials.

The speech and debate clause functionally serves to advance separation of powers by protecting legislative functions from executive and judicial intrusions. The Supreme Court explained: "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. . . . The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for insuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 178-79 (1975).

The Court of Appeals overlooks a key distinction between legislators and administrative officials. Legislators are reviewed through the electoral process. But administrative officials are generally insulated from direct political accountability. Judicial review of the latter

is therefore essential in light of the absence of a direct political check.

The need for *legislative* independence does not justify absolute immunity for executive officials. Whereas absolute immunity is the standard for legislators, qualified immunity is the "norm for executive officials." *Buckley v. Fitzsimmons*, 113 S.Ct. at 2613. Executive rule-making and rate-making is traditionally subject to judicial review. There is no historical or functional basis for according absolute immunity to such executive conduct.

3. It would be a dramatic, unjustified expansion of absolute immunity to accord it to all executive officials engaged in administrative rule-making and rate-setting

The Court of Appeal's holding is a radical expansion of absolute immunity. The court accords absolute immunity to all executive officials engaged in rule-making or rate-setting. Such an expansion is fundamentally at odds with the Supreme Court's repeated statement that courts should be "quite sparing" in according absolute immunity. *Buckley v. Fitzsimmons*, 113 S.Ct. at 2613; *Burns v. Reed*, 111 S.Ct. at 1939; *Tower v. Glover*, 467 U.S. 914, 920 (1984).

Absolute immunity places the actions of government officials – no matter how illegal or even malicious – unreviewable. This is contrary to § 1983's objectives of compensating injured individuals and deterring wrongful conduct. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (articulating the goals of § 1983). According defendants absolute immunity in this lawsuit is an

unjustified expansion of absolute immunity to executive officials and is counter to § 1983's underlying objectives.

The breadth of the Court of Appeal's holding is evidenced by the consequences of according legislative immunity to all executive officials engaged in rule-making or rate-setting. Legislators, unlike any other officials accorded absolute immunity, have immunity to suits for injunctive relief. *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U.S. at 733. According absolute legislative immunity to executive officials engaged in rule-making or rate-setting is that they could not be named as defendants in suits for injunctive or declaratory relief when their actions were unconstitutional or otherwise illegal. Because the state government and its agencies cannot be named as defendants due to the Eleventh Amendment, the effect of the district court's ruling often would be to immunize agency rules and rates from judicial review.

The Court of Appeals decision would accord defendants absolute legislative immunity to suits for money damages, but not grant them absolute legislative immunity to suits for injunctive or declaratory relief. (App. at 8). No precedent exists for treating the identical act and function as legislative if one remedy is sought, but administrative if another remedy is sought.

Thus, this case presents an opportunity for the Court to clarify the circumstances under which executive officials engaging in the common and traditional administrative functions of rule-making and rate-setting are protected by absolute legislative immunity.

II. This Court Should Decide the Important Question as to Whether Rules With a Particularized Impact Should Be Regarded As Legislative

Even if the above analysis were incorrect and rule-making by executive officials is generally to be regarded as legislative in nature, the rules at issue in this litigation were particularized in their impact and therefore should not be protected by absolute immunity. This Court never has addressed whether absolute legislative immunity should be accorded to rules that are intentionally particularized in their scope and effect. This case presents the Court with an opportunity to clarify the important issue as to the scope of absolute legislative immunity.

Courts of appeals throughout the country have ruled that even legislators are not deemed to act in a legislative capacity when they promulgate regulations with specific, rather than general impact.

For example, in *O'Brien v. City of Greers Ferry*, 873 F.2d 1115 (8th Cir. 1989), the court found that members of a city council could not claim absolute immunity for their failure to provide compensation to an alderman who had requested reimbursement for legal fees incurred in defending a defamation action. The court emphasized that a particularized determination is not protected by legislative immunity, even when the decision is made by legislators.

Similarly, in *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984), the court held that members of a town planning board were entitled only to qualified immunity for the conditions that they imposed on development of the

plaintiff's subdivision. The court explained that an action that "single[s] out specifiable individuals and affect[s] them differently from others" is administrative and not legislative.

In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), members of a city council were deemed to have only qualified immunity for their decision to withhold the issuance of a building permit to plaintiff builder. The court explained that their decision was executive in nature because it "neither applied to the general community, nor involved the promulgation of legislative policy as a defined and binding rule of conduct. Rather it was directed specifically and solely at a single individual." 857 F.2d at 1304.

These decisions are in accord with a large body of authority holding that actions directed at specific individuals, even when taken by legislative bodies, are executive and not legislative in nature. *See, e.g., Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992); *Hughes v. Tarrant County, Texas*, 948 F.2d 918 (5th Cir. 1991); *Cinevision Corporation v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

In this case, the actions of the defendants applied only to Redwood Village. The regulations were drafted specifically to reverse the North Dakota Supreme Court's decision concerning Redwood Village. *Redwood Village v. North Dakota Department of Human Services*, 420 N.W.2d 333 (N.D. 1988). The regulation concerning allowable interest, § 75-02-07-04(7), was adopted with the specific purpose of overturning this decision and adversely affecting Redwood Village.

The regulation concerning recapture of depreciation went into effect July 1, 1989 and applied to sales after June 1, 1984. N.D.A.C. § 75-02-07-04(8). One, and only one, facility was covered by the retroactive effect of this regulation: Redwood Village.

Likewise, the regulation determining the depreciation on sales, N.D.A.C. § 75-07-04(7), applied only to facilities bought between June 1, 1984 and July 1989. Again, the only facility affected by the regulation was Redwood Village.

Because the retroactive effect of the regulations was so particularized in their actual and intended effect, they should not be regarded as legislative in nature. Accordingly, absolute immunity is inappropriate. This case presents the opportunity for this Court to clarify the important issue as to whether absolute legislative immunity applies to actions that are not general in scope, but are intentionally particularized to a specific person or entity.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ERWIN CHEMERINSKY
University of Southern California
Law Center
University Park
Los Angeles, CA 90089
(213) 740-2539

PAUL HOFFMAN
100 Wilshire Blvd.
Suite 1000
Santa Monica, CA 90401
(310) 260-9585

LAROY BAIRD
322 East Main, 2nd Floor
P.O. Box 913
Bismarck, N.D. 58502
(701) 223-6400

ELLIOTT SIMON
One East Wacker Dr. #3622
Chicago, IL 60601
(312) 329-0626

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2413

Redwood Village Partnership, an Illinois Partnership;

Appellant;

v.

John Graham; Blaine Nordwall; Robert Wanner; Barb Howe; Don Johnson; Charles Ehrhardt, in their individual capacity;

Appellees.

No. 93-2495

Redwood Village Partnership, an Illinois Partnership;

Appellee;

v.

John Graham; Blaine Nordwall; Robert Wanner; Barb Howe; Don Johnson; Charles Ehrhardt, in their individual capacity;

Appellants.

Appeals from the United States District Court for the District of North Dakota.

Submitted: March 17, 1994
Filed: June 9, 1994

Before HANSEN, Circuit Judge, and HEANEY and JOHN R. GIBSON, Senior Circuit Judges.

HEANEY, Senior Circuit Judge.

Redwood Village Partnership, owner of a basic care facility, brought this action for money damages under 42 U.S.C. § 1983 against six employees of the North Dakota Department of Human Services,[1] alleging that their promulgation of administrative regulations violated the partnership's rights under the Constitution. The district court granted summary judgment for the state employees on the ground of absolute immunity. We affirm.

I.

Redwood Village, Inc., was a state-licensed, basic care facility located in Wilton, North Dakota, and owned by Mr. and Mrs. John Hruby. In 1984 the Hrubys sold the facility to Redwood Village Partnership ("Redwood"), an Illinois limited partnership which was created for the purpose of buying the facility. Redwood's two general partners were the facility's accountant, who lived in

---

[1] John Graham was executive director of the Department, Blaine Nordwall was an assistant attorney general serving as chief legal counsel for the Department, and Robert Wanner, Barb Howe, Don Johnson, and Charles Ehrhardt were Department employees.

Bismarck, North Dakota, and an Illinois attorney. The Hrubys continued to manage the facility after the sale.

This controversy arose from a disagreement between Redwood and the North Dakota Department of Human Services over the state's rate of reimbursement for the care of residents receiving public assistance. These "public pay" residents constituted the majority of the facility's residents. Shortly after buying the facility, the partnership applied to the Department for reimbursement for the period from July 1, 1985, through June 30, 1986. The reimbursement rate is based on a facility's allowable costs, including depreciation and interest costs. *See* N.D. Admin. Code Ch. 75-02-07. Redwood requested a rate of reimbursement based on the purchase price of the facility. The Department, however, determined that the rate should be based on what a prudent and cost-conscious buyer would have paid rather than the actual purchase price. The Supreme Court of North Dakota ultimately resolved the issue, holding that the Department's calculation of depreciation was appropriate but that it misapplied its regulations concerning allowable interest costs. *Redwood Village Partnership, Ltd. v. North Dakota Dep't of Human Servs.*, 420 N.W.2d 333, 339 (N.D. 1988). The court remanded the case to the Department for recalculation of the reimbursement rate for the Redwood Village facility for the 1985-86 fiscal year.

Redwood continued to receive reimbursements according to the supreme court's interpretation of the regulations until the Department proposed new reimbursement rules for basic care facilities through a formal rulemaking process. The proposed rules, with an effective date of July 1, 1989, were largely patterned on existing

rules for long-term care facilities. *See* Preamble for Proposed Amendments to N.D. Admin. Code Ch. 75-02-07, Joint Appendix at 204. Redwood submitted written objections in November 1988 during the comment period of the rulemaking process. After adoption of the rules, however, Redwood did not seek judicial review of the rule changes to challenge their legality. Instead, Redwood sold the facility back to the Hrubys on June 30, 1989, allegedly at a loss, just before the effective date of the new rules. Thereafter Redwood brought this action for money damages against six Department officials involved in promulgating the rules.

II.

Redwood's complaint alleged that three of the new regulations were adopted specifically to apply retroactively to Redwood alone in order to circumvent the decision of the North Dakota Supreme Court. Those rules concerned the treatment of interest and depreciation expenses when calculating the reimbursement rate for "public pay" residents, and recapture of depreciation upon sale of the facility. *See* N.D. Admin. Code §§ 75-02-07-04(7), 75-02-07-04(8), 75-02-07-05(7). The partnership claimed that the arbitrary retroactive rulemaking violated its Fourteenth Amendment rights to due process and equal protection, the takings clause of the Fifth Amendment, and the privileges and immunities clause of article IV, section 2 of the Constitution. Redwood asserted that the executive officials were entitled to only qualified, not absolute, immunity for their administrative rulemaking.

The sole issue we are called upon to decide is whether the Department officials are absolutely immune from federal damages claims for their promulgation of rules. The only conduct complained of is the rulemaking itself; there was no application or enforcement of the rules against Redwood because it sold its basic care facility before the amended rules came into effect. We review de novo the district court's determination that the Department officials were absolutely immune from liability for damages. *See Brown v. Griesenauer*, 970 F.2d 431, 434 (8th Cir. 1992).

The Supreme Court has adopted a functional approach to questions of immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982). "Absolute immunity flows not from rank or title or 'location within the Government' but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Butz v. Economou*, 438 U.S. 478, 511 (1978)). The critical inquiry is the nature of the official's function a particular proceeding, not the identity of the actor who performed the function. *See Forrester v. White*, 484 U.S. 219, 229 (1988); *Brown*, 970 F.2d at 436. The nature of a proceeding, in turn, "depends not upon the character of the body but upon the character of the proceedings." *Brown*, 970 F.2d at 436 (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983) (citation omitted)).

The rulemaking undertaken by the Department officials was legislative in nature. Legislation "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Brown*, 970 F.2d at 437 (quoting

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)). The three rules that Redwood specifically complained of apply by their terms to all basic care facilities. During the rulemaking comment period, the proposed rules elicited responses from several basic care facilities, including Redwood Village, concerning the impact of the proposed rules on their operations. The new reimbursement rate formula applied only to payments made beginning with the 1989 fiscal year. While the challenged regulations do have an element of retroactivity in that they use June 1, 1984, as a baseline date when calculating the basis for depreciation and interest expenses and determining depreciation costs that are subject to recapture if the facility is later sold at a price exceeding the undepreciated value, these regulations apply generally to any facility that is sold after the effective date of the regulations.

Redwood urges us to adopt the language and holding of the Fifth Circuit in *Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir. 1990), which concluded that a parole board's enactment of rules was an "administrative" function which entitled the board members only to qualified immunity. The characterization of rulemaking as "administrative" does not assist us in analyzing the immunity question under a functional approach, however. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) (state supreme court's enactment of state bar disciplinary code was act of "rulemaking" performed in "legislative" capacity). Nor is this characterization bolstered by Redwood's statements that the Department's new rules in essence govern ratesetting, and ratesetting is a classic executive function. *See Prentis*, 211 U.S. at 226

("The establishment of a rate [by the Virginia State Corporation Commission] is the making of a rule for the future, and therefore is an act legislative" in nature.) We agree instead with the reasoning of the District of Columbia Circuit in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983), which considered a damages claim against five former members of the Consumer Product Safety Commission. Noting that "[l]egislation is a function entitled to absolute immunity, with the immunity following the function and not the office," the court stated that "it is clear that when an agency exercises quasi-legislative regulatory authority, action for money damages against agency members will not lie." *Id.* at 395 (citations omitted). We likewise hold that the Department officials who promulgated the amended rules for basic care facilities are absolutely immune from suit for damages.

Redwood contends that a major reason to reject absolute immunity from damages liability here is that according "legislative" immunity to executive officials for their rulemaking would also bar any action for declaratory or injunctive relief. The partnership cites *Consumers Union* to support this proposition. We disagree with Redwood's reading of that case. When discussing *Consumers Union* in its *Forrester* decision, the Supreme Court clearly limited the concept of "legislative" immunity to the rulemaking act itself:

> In explaining why legislative, rather than judicial, immunity furnished the appropriate standard, we said: "Although it is clear that under Virginia law the issuance of the Bar Code was a

> proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking." (Citation omitted.) Similarly, in the same case, we held that judges acting to enforce the Bar Code would be treated like prosecutors, and thus would be amenable to suit for injunctive and declaratory relief. (Citation omitted.) Once again, it was the nature of the function performed, not the identity of the actor who performed it, that informed our immunity analysis.

Forrester, 484 U.S. at 228-29. The absolute immunity we confer upon the Department officials is for their conduct of rulemaking. Suits for declaratory and injunctive relief are still available to challenge regulations.

We recognize the tension between the "interest in having governmental officials exercise their judgment free of the fear of burdensome litigation" and the "interest in checking improper official conduct and in providing wronged individuals with adequate remedies for their injuries." *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607, 712 (8th Cir. 1980). The threat of damages liability not only encourages officials to carry out their duties in a lawful manner, but also "can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester,* 484 U.S. at 223. We conclude that exposure to liability for monetary damages would unduly inhibit executive officials when carrying out the quasi-legislative act of rulemaking. We therefore hold that executive officials are absolutely immune from suits

for money damages under section 1983 for their promulgation of rules, and we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

REDWOOD VILLAGE PARTNERSHIP an Illinois Partnership,	)	
Plaintiff,	)	Civil No. A1-91-108
-vs-	)	
JOHN GRAHAM, BLAINE NORDWALL ROBERT WANNER, BARB HOWE, DON JOHNSON, and CHARLES EHRHARDT, in their individual capacity,	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Apr. 27, 1993)

Redwood Village Partnership (plaintiff) brought this 42 U.S.C. § 1983 action against John Graham, Blaine Nordwall, Robert Wanner, Barb Howe, Don Johnson, and Charles Ehrhardt (defendants) to recover monetary damages for the alleged violation of plaintiff's civil rights.

Defendants filed a rule 56, Federal Rules of Civil Procedure motion for summary judgment. Thereafter plaintiff filed a motion for summary judgment for the relief pleased in its Complaint. Plaintiff's motion is denied.

Summary Judgment is available to a party when a review of the pleadings and other documents filed indicate there exists no genuine issue of material fact and a

party is entitled to judgment, as a matter of law. Fed. R. Civ. P. 56, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A Court considering a motion for summary judgment must view the evidence in a light most favorable to the non-moving party. The non-moving party is entitled to all reasonable inferences that can be drawn from the evidence. *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989). For purposes of this opinion, the plaintiff will be considered to be the non-moving party.

FACTUAL BACKGROUND

Redwood Village is a partnership organized under the laws of Illinois. The partnership was formed to acquire and operate Redwood Village, a basic care home for the elderly and infirm located in Wilton, North Dakota, which it purchased on December 31, 1984.

The course of events that has culminated in the current law suit has been recited by the North Dakota Supreme Court in *Redwood Village v. N.D.Dept. of Human S.*, 420 N.W.2d 333 (N.D. 1988). Plaintiff, as the owner of Redwood Village was entitled to a per patient reimbursement of allowable operating expenses for public pay residents. The amount of reimbursement was calculated by the North Dakota Department of Human Services.

Reimbursable expenses included an allocation for the recoupment of depreciation and of interest expense incurred by the owner in the acquisition of the facility. The controversy in this case had its genesis in the inability of the parties to agree on the amount of reimbursement for interest expenses and depreciation.

Administrative proceedings were instituted by the plaintiff for the purpose of rectifying what the plaintiff felt was an inequitable reimbursement rate. According to Redwood Village, the practical effect of the culmination of this quest for a proper reimbursement rate was the decision by the North Dakota Supreme Court in favor of Redwood Village.

Redwood Village alleges the response of the North Dakota Department of Human Services to this unfavorable court decision was the promulgation of retroactive administrative rules designed specifically to circumvent the North Dakota Supreme Court decision and to penalize Redwood Village. Defendants in this case were at all times relevant to this controversy, employed by the North Dakota Department of Human Services.

DISCUSSION

Plaintiffs describe the role of each of the defendants in this case as:

> All defendants at all times reference [sic] in this complaint were acting and operating within the scope of their employment and under the authority and color of the laws, statutes and administrative rules of the State of North Dakota. The defendants in their capacities as employees of the Department of Human Services and the State of North Dakota are charged with the responsibility of licensing and regulating the operation of basic care homes for the

> aged and infirm in the State of North Dakota, such as Redwood Village."[1]

Plaintiff's Amended Complaint (Doc. # 21) at 2.

Absolute immunity is a complete shield for defendants sued pursuant to 42 U.S.C. § 1983. Qualified immunity affords defendants immunity from suit if their conduct was objectively reasonable. *See Owen v. City of Independence*, 445 U.S. 622, 637-38 (1980). In this case, defendants seek summary judgment dismissal based on a claim that absolute legislative immunity, or, in the alternative, qualified immunity, shields them from suit. The court has considered the claims of the defendants and the plaintiff's response thereto, and concludes defendants are entitled to summary judgment dismissal based on absolute legislative immunity.

The concept of absolute legislative immunity has long been recognized. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (recognizing the preservation of a legislator's privilege, in both state and federal government, to be free to do and say as they might in the implementation of legislation). The purpose behind it is to afford legislators immunity "from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* at 377. The application of the privilege does not involve consideration of whether the actor had an improper purpose in conducting the legislative function in question. *Id.*

---

[1] Defendant Blaine Nordwall was described as being an Assistant Attorney General of the State of North Dakota and the Chief Legal Counsel of the North Dakota Department of Human Services.

In considering whether a particular official or officials are entitled to absolute immunity, the Supreme Court has mandated a "functional approach". *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982). Under this approach, courts must examine "the nature of the functions with which a particular official or class of officials have been lawfully entrusted, and [then] seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1987). "Thus, under the functional approach to immunity law, the critical inquiry is in what capacity the defendants were acting at the time of the allegedly unconstitutional or unlawful conduct." *Brown v. Griensenauer*, 970 F.2d 431, 436 (8th Cir. 1992). Therefore, it does not matter that the actor's office is in the executive, judicial or legislative branch of government; if the act is legislative in nature, absolute immunity may be appropriate. *Id.* The next step in the analysis necessarily requires an evaluation of the capacity in which the defendants were acting when they engaged in the complained of conduct.

The conduct of defendants that plaintiff alleges deprived it of its constitutional rights involved the actions of defendant employees of the North Dakota Department of Human Services in promulgating administrative rules through the formal rule making procedure. The new rules provided that with respect to facilities acquired after July 18, 1984, the State, in setting the reimbursement rate, would consider the basis for depreciation to be the seller's cost of the facility as of July 18,

1984, rather than the purchaser's cost to acquire the facility. A similar rule was promulgated with respect to allowable interest expense. The new rules also enabled the State to recapture the depreciation expense back to June 1, 1984, in the event a facility was sold in the future. The State claims its purpose in promulgating the new rules "was to conform the basic care rules to the existing and more comprehensive rate setting rules for nursing homes." Defendant's Brief in Support of Motion for Summary Judgment (Doc. # 26) at 8. Also cited as a reason for the new rules was the need "to tighten up the existing rules in terms of cost control." *Id.* Thus, from the date the new rules went into effect a change had been made affecting the *future* per-patient rate that facilities transferred after July 18, 1984, were entitled to receive from the State. These new rules affect the *future* per-patient rate of all facilities transferred after July 18, 1984, but did not become effective until July 1, 1989. The transfer of the facility by the plaintiff herein was consummated prior to July 1, 1989.

The North Dakota Department of Human Services is an administrative agency of the executive branch of the state government of North Dakota. *See* N.D.Cent.Code § 28-32-01 (1991) (definitions). Pursuant to N.D.Cent.Code § 28-32-02, the Department is authorized, and required, to establish rules. Pursuant to this section, the Code requires opportunity for public input into the rule making process. *See* N.D.Cent Code § 28-32-02(3) (1991) (agency must conduct oral hearing and make a written record detailing its consideration of any written and oral submissions received). Notice of public hearing, scheduled for November 18, 1988 at the State Capital in

Bismarck, North Dakota, was published in the *Bismarck Tribune, Devils Lake Daily Journal, Dickinson Press, Williston Daily Herald, Grand Forks Herald, Jamestown Sun and the Minot Daily News*. The published notice invited interested members of the public to attend the hearing and discuss the Department's proposed rule changes or, in the alternative, the public was invited to send written comments to the Department. It appears a copy of the proposed rules was sent to the operator of every home for the aged and infirm in the state of North Dakota prior to the meeting. The Department received written comments from nine commentators, two of whom made oral presentations at the public hearing.[2] The Department issued a written statement wherein it outlined the comments it had received and described its reaction to the issues addressed in the comments. The proposed rules were then sent to the Attorney General's office for review. They were approved by the Attorney General and pursuant to the requirements of N.D.Cent.Code § 28-32-03 (1991), the rules were adopted, published in the North Dakota Administrative Code, and given the force and effect of law.

The conduct at question resulted in promulgated revised rules that apply to everybody. *See Griesenauer*, 970 F.2d at 437 ("Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."); *See also Bateson v. Greisse*, 857 F.2d 1300, 1304

---

[2] Gregory Cleveland, General Partner of Redwood Village submitted a written response to the proposed rule changes in which he addressed his concerns relating thereto.

(9th Cir. 1988) (describing legislative acts as those which apply to everybody, while acts that apply to a single person or group are categorized as executive). The plaintiff alleges the rules were designed to harm it specifically, but the court notes the rules do not single out the plaintiff or in any way suggest they are to be applied only against the plaintiff. That provisions of the new rules may only have affected plaintiff does not change the nature of the defendants' conduct from legislative to executive. The conduct of the defendants in adopting the new rules is, in the court's view, classically legislative.

The same rationale that traditionally supports the grant of absolute immunity to "legislators" likewise mandates the grant of such immunity to those executive branch individuals who in substance, are performing a legislative function. The conduct of the defendants in formulating the rules in this case is best described as legislative.[3] The purpose behind affording absolute legislative immunity is to ensure that individuals charged with implementing legislation may perform this vital function and be absolved from a threat of retribution in the form of law suits brought by those adversely affected by the rules. The court concludes absolute legislative immunity in this case is consistent with the rationale of

---

[3] In *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391 (1978), the Supreme Court granted absolute legislative immunity to a Regional Planning Agency, consisting in part of non-elected individuals appointed jointly by the State of California and Nevada. *Id.* at 406. This court views the instant case and that as existed in *Lake Country* to be similar.

the Supreme court where such immunity has been granted.[4]

IT IS ORDERED:

1) Plaintiff's motion (Doc. # 38) for summary judgment is without merit and is denied. It's complaint is dismissed.

2) Defendant's motion (Doc. # 26) for summary judgment is granted. Judgment shall be entered accordingly.

Dated this 27th day of April, 1993.

/s/ Paul Benson
PAUL BENSON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

---

[4] In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), the U. S. Supreme court granted the Virginia Supreme Court absolute legislative immunity for its conduct in promulgating the Virginia Code of Professional Responsibility. The Court noted that had the state legislature enacted the same code, which it could have, that body would likely have prevailed on the basis of absolute legislative immunity. *Id.* at 733-34. In the instant case, the North Dakota State Legislature could have legislated the rules that were promulgated by the Department of Human Services.

The court also notes the situation in this case is similar to that in *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz*, the Court granted absolute judicial immunity to executive branch officials engaged as administrative hearing officers. *Id.* In doing so, the Court stated, "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id.* at 512-13.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

REDWOOD VILLAGE PARTNERSHIP an Illinois Partnership,	)	
Plaintiff,	)	Civil No. A1-91-108
v.	)	
JOHN GRAHAM, BLAINE NORDWALL ROBERT WANNER, BARB HOWE, DON JOHNSON, and CHARLES EHRHARDT, in their individual capacity, Defendants.	)	

JUDGMENT

(Filed Apr. 27, 1993)

Pursuant to the order for judgment entered in the above captioned case this date,

IT IS ADJUDGED AND DECREED Plaintiff's Complaint is dismissed.

Dated this 27th day of April 1993.

/s/ Paul Benson
PAUL BENSON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
OCT 3 1994
OFFICE OF THE CLERK

No. 94-408

In The

Supreme Court of the United States

October Term, 1994

REDWOOD VILLAGE PARTNERSHIP,
an Illinois Partnership,

Petitioner,

v.

JOHN GRAHAM, BLAINE NORDWALL, ROBERT WANNER, BARB HOWE, DON JOHNSON, AND CHARLES EHRHARDT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES S. MILLER, JR.
ROBERT J. UDLAND*
FLECK, MATHER & STRUTZ, LTD.
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 48402
(701) 223-6585

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

29 pp

QUESTIONS PRESENTED

I.

Are executive officials engaged in formal rulemaking entitled to absolute legislative immunity from suits for money damages brought against them in their individual capacities?

II.

Are the respondents entitled to qualified immunity if it should be determined that they are not entitled to absolute immunity?

PARTIES

Petitioner, Redwood Village Partnership, is an Illinois limited partnership. Gregory Cleveland, a Bismarck, North Dakota resident, and Elliot Simon, an Illinois resident, are the general partners.

Respondent John Graham was executive director of the North Dakota Department of Human Services. He currently is a resident of Ocala, Florida. Respondent Don Johnson was an employee of the Department of Human Services who is now retired and resides in Fargo, North Dakota. Blaine Nordwall was an assistant attorney general serving as legal counsel for the Department of Human Services who currently works for the Department of Human Services and resides in Bismarck, North Dakota. Respondents Robert Wanner, Barb Howe, and Charles Ehrhardt are all employees of the North Dakota Department of Human Services and reside in Bismarck, North Dakota.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 8

1. The claimed conflict in the circuits is illusory ... 8

2. Granting executive department officials absolute immunity for formal rulemaking is consistent with prior cases decided by this Court, is likely only to be applied in limited numbers of cases, and is desirable from the standpoint of public policy 11

3. The second issue raised by the petitioner, as to whether rules with a particularized impact should be regarded as legislative, is not worthy of certiorari 17

4. Even if this Court were to decide that the respondents are not entitled to absolute immunity, the judgment must be affirmed because the respondents are clearly entitled to qualified immunity 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977)..... 19

Anco, Inc. v. State Health and Human Services Finance Commission, 388 S.E.2d 780 (S.C. 1989)..... 20

Anderson v. Creighton, 483 U.S. 635 (1987) 21

Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993)..... 13

Butz v. Economou, 438 U.S. 478 (1978) 11, 12

Calhoun v. St. Bernard Parish, 937 F.2d 172 (5th Cir. 1991).....10, 16

Creighton Omaha Regional Health Care v. Sullivan, 950 F.2d 563 (8th Cir. 1991)..... 19

Daughters of Miram Center for the Aged v. Mathews, 590 F.2d 1250 (3rd Cir. 1978)..... 19

F.H.A. v. Darlington, Inc., 358 U.S. 84 (1958) 20

Fairfax Nursing Center, Inc. v. Califano, 590 F.2d 1297 (4th Cir. 1979)..... 19

Farrish v. Mississippi State Parole Board, 836 F.2d 969 (5th Cir. 1988).....9, 10

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 21

Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger, 543 F.2d 703 (9th Cir. 1976) 19, 20

Hempstead General Hospital v. Whalen, 474 F.Supp. 398 (E.D.N.Y. 1979)..... 20

TABLE OF AUTHORITIES – Continued

Page

Hoodkroft Convalescent Center, Inc. v. State of New Hampshire, Div. of Human Services, 879 F.2d 968 (1st Cir. 1989) 19

Hughes v. Tarrant County Texas, 948 F.2d 918 (5th Cir. 1991) 10

Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) 8, 12

Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170 (2nd Cir. 1991) 21

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 11, 12, 15

Livingston Care Center, Inc. v. U.S., 934 F.2d 719 (6th Cir. 1991) 20

Mercy Community Hospital v. Heckler, 781 F.2d 1552 (11th Cir. 1986) 19

Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dept. of Pub. Welfare, 742 F.2d 442 (8th Cir. 1984) 20

New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 12, 14

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 12

Professional Medical Care Home, Inc. v. Harris, 644 F.2d 589 (7th Cir. 1980) 19

Redwood Village v. N.D. Department of Human Services, 420 N.W.2d 333 (N.D. 1988) 3

Senape v. Constantino, 936 F.2d 687 (2nd Cir. 1991) 21

TABLE OF AUTHORITIES – Continued

Page

Springdale Convalescent Center v. Mathews, 545 F.2d 943 (5th Cir. 1977) 19, 20

Stewards Found. v. United States, 654 F.2d 28 (Ct. Cl. 1981) 19

Summit Nursing Home, Inc. v. United States, 572 F.2d 737 (Ct. Cl. 1978) 19

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 11, 12, 13, 14, 15

Walter v. Torres, 917 F.2d 1379 (5th Cir. 1990) ... 8, 9, 10

Whitney v. Heckler, 780 F.2d 963 (11th Cir. 1986) 20

Yeldell v. Cooper Green Hosp., Inc., 956 F.2d 1056 (11th Cir. 1992) 13

N.D. Admin. Code:

Ch. 75-02-07 3

§ 75-02-07-04(7) 6

§ 75-02-07-04(8) 5

§ 75-02-07-05(1)(a)(7) 6

N.D. Cent. Code:

§ 28-32-03 4

§ 50-06-14.2 3

No. 94-408

In The

Supreme Court of the United States

October Term, 1994

REDWOOD VILLAGE PARTNERSHIP,
an Illinois Partnership,

Petitioner,

v.

JOHN GRAHAM, BLAINE NORDWALL, ROBERT WANNER, BARB HOWE, DON JOHNSON, AND CHARLES EHRHARDT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion affirming the district court's decision in this case. The Eighth Circuit's opinion is reported at 26 F.3d 839 (8th Cir. 1994) and the district court's opinion at 819 F.Supp. 867 (D.N.D. 1993).

STATEMENT OF THE CASE

Redwood Village is a state-licensed facility that provides "basic care" for the aged and the infirm. In 1984, Redwood's accountant and an Illinois attorney formed the petitioner, an Illinois limited partnership, and purchased the facility for investment purposes. [App. at 2-3].

The record below established that petitioner's intent was to operate the facility for a limited period of time and then sell it. The two sole shareholders of the closely held corporation that owned the facility prior to its purchase, Mr. and Mrs. John Hruby, continued to manage the facility for the petitioner after the sale.

At the time of its purchase, most, if not all, of Redwood's residents were on public assistance. Redwood would receive reimbursement for the care of the "public pay" residents from the county governments responsible for their care based upon a per-resident rate established by the North Dakota Department of Human Services [hereinafter "Department"]. Each year, the Department would establish a new rate for each facility serving "public pay" residents. The new rates would be applied prospectively for the upcoming year and would be based on a facility's allowable costs, including depreciation and interest costs. [App. at 3].

Redwood was not obligated to serve "public pay" residents, and there are basic care facilities in North Dakota that serve only "private pay" residents. The rates that can be charged "private pay" residents are not regulated.

Shortly after the purchase of Redwood, the petitioner became involved in litigation with the Department over the reimbursement rate set for Redwood for the fiscal year July 1, 1985, through June 30, 1986. This litigation was ultimately resolved in 1988 by the North Dakota Supreme Court in *Redwood Village v. N.D. Department of Human Services*, 420 N.W.2d 333 (N.D. 1988). The North Dakota Supreme Court unanimously found in favor of the Department on one issue, and on a 3-2 vote, in favor of the petitioner on the other issue. Upon conclusion of the litigation, the petitioner received the additional compensation to which it was entitled as a consequence of the supreme court's decision for the specific rate year in issue. Petitioner further received reimbursements consistent with the supreme court's decision for subsequent rate years until the rate-setting rules changed in 1989. [App. at 3-4].

In 1989, the Department substantially overhauled the rate-setting rules for facilities providing basic care to "public-pay" residents. The specific rules referenced by the petitioner were only a small part of the rule changes that were made, which are codified at N.D. Admin. Code ch. 75-02-07. The Department adopted the 1989 rule changes by formal rulemaking, which included notice of the proposed rulemaking, receipt and consideration of written comments, and a hearing. The petitioner participated in the rulemaking process.

The rules were promulgated by the Department pursuant to an express grant of legislative authority. N.D. Cent. Code § 50-06-14.2 [previously N.D. Cent. Code §§ 50-18-06 and 50-18-06.1 (now repealed)]. The rules

when adopted had the force and effect of law. N.D. Cent. Code § 28-32-03. [App. at 15-16].

The petitioner sold Redwood Village back to the Hrubys, allegedly at a loss, after the promulgation of the 1989 rule changes, but before the rule changes became effective. [App. at 4]. Petitioner claims it had no choice but to sell the facility at a loss. This is simply not correct.

The petitioner had the option of not continuing to serve "public pay" residents if it decided it would be no longer economic for it to do so. Further, if the rule changes were so obviously unconstitutional, as petitioner contends, the petitioner had the option of seeking injunctive relief in either state or federal court.

Petitioner asserts that one of the amended rules was a subversion of the previously referenced North Dakota Supreme Court decision. However, that decision only applied the rate-setting rules which were in effect for the 1985-1986 rate year. The decision has no relevance to this case because the rules were changed in 1989 and because there is nothing that prohibited the Department from changing the rules.

Petitioner also asserts that several of the rules adopted in 1989 applied only to Redwood; hence, petitioner argues the rulemaking process cannot be considered legislative in character. However, the Eighth Circuit and the district court both examined the rules, along with the underlying administrative record. Both the Eighth Circuit and the district court concluded the rules were general in scope and were not promulgated to apply only to Redwood. [App. at 6, 17].

One of the objectives of the Department in adopting the 1989 amendments was to tighten up the existing rules in terms of cost control. For the most part, this was accomplished by conforming the "basic care" rules to the more comprehensive "nursing home" rate-setting rules, which had been updated in 1984 in order to meet federal requirements. [App. at 3-4, 15]. However, there were some changes made to the "basic care" rules that were later also incorporated into the nursing home rules. In terms of cost control, one of the Department's specific concerns was the potential for abuse resulting from the repeated sale ("churning") of facilities and the claiming of excessive depreciation and interest expense for rate-setting purposes, as a consequence.

Another objective of the Department in making the rule changes was to lessen the administrative burdens on both the facilities and the Department in situations where the facilities would be serving both "basic care" and "nursing home" residents. Further, making the "basic care" and the "nursing home" regulations uniform allowed for an easier transition, and protected the public's interest, with regard to controlling costs, should a facility shift from serving one type of resident to another.

Petitioner complains about three particular changes in the rules. For the most part, the complained about changes were patterned after similar provisions that were already in effect for nursing homes under the existing nursing home rules.

One of the complained about provisions is N.D. Admin. Code § 75-02-07-04(8). This section provides that, if an operator sells an asset, or removes it from service,

any depreciation costs asserted after June 1, 1984, may be recaptured to the extent the sale price exceeds the undepreciated value of the asset. Although the provisions provide for recapture of excess depreciation taken prior to the effective date of the recapture provisions, the provisions are prospective in nature in that (1) the provisions only apply to asset transactions occurring after the effective date of the 1989 regulations, and (2) the mechanism for recapturing the depreciation provides for recapture only as an adjustment to future reimbursement payments. There is no recapture if the sale or the disposal price of the asset does not exceed its undepreciated value. Further, there is no recapture if a facility were to go out of business or were to stop serving public pay residents, because there would be no future payments from which to make the recapture.

The other two provisions challenged by the petitioner are N.D. Admin. Code §§ 75-02-07-04(7) and 75-02-07-05(1)(a)(7). Petitioner claims these provisions would have lowered the amount of depreciation and interest expense that the petitioner could have claimed for future rate years after the effective date of the regulations. Since the petitioner sold its facility prior to these regulations taking effect, the Department did not have the opportunity to construe and apply these two particular regulations to the petitioner. However, assuming the provisions regarding depreciation and interest would have been applied as the petitioner suggests, the operation of the two regulations is clearly prospective in that they affect only the amount of depreciation and interest that could be claimed in future rate years after the effective date of the regulations. There is nothing in the newly

adopted regulations that allows the counties to go back and recalculate reimbursements for prior rate years and demand a refund.

Petitioner claims that it was the only facility that was impacted by the three complained about rule changes. This is simply not correct. While the impact on Redwood may have been greater under certain circumstances (if all of the changes from the three complained about rules had been actually applied to Redwood), other facilities were also impacted by the regulations.

For example, all facilities are subject to the recapture of depreciation provisions for excess depreciation taken after June 1, 1984 – not just facilities acquired after that date. Further, the petitioner looks at the rule changes, particularly the two changes affecting the allowable basis for claiming future depreciation and interest expense, only from the perspective of a purchaser. In fact, the "investment expectations" of all facility owners, who someday might be sellers, were upset by the regulations. After the passage of the regulations, prospective purchasers undoubtedly were willing to pay less money than before for facilities to be used for serving "public pay" residents. This is because the allowable basis for calculating depreciation and interest expense after the passage of the regulations could be no greater than the seller's basis.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The claimed conflict in the circuits is illusory.

The only two circuit court cases that have squarely addressed the issue of whether executive department officials engaged in formal rulemaking are entitled to absolute "legislative" immunity from damage suits, brought against them in their individual capacities, are the Eighth Circuit's decision in this case and the decision of the District of Columbia Circuit in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983). The District of Columbia Circuit, in an opinion written by Judge Bork, concluded, as did the Eighth Circuit, that absolute legislative immunity protects agency officials from suits for damages when the agency officials are engaged in the quasi-legislative activity of formal rulemaking.

Petitioner relies on the Fifth Circuit case of *Walter v. Torres*, 917 F.2d 1379 (5th Cir. 1990), as creating the conflict. However, it does not appear that the applicability of absolute "legislative," as opposed to "judicial," immunity was ever raised in that case. For this reason, and because of the existence of other Fifth Circuit cases that call into question the decision reached by the particular Fifth Circuit panel that considered *Walter*, it does not appear the Fifth Circuit has explicitly resolved the issue presented by the petitioner.

In *Walter*, a prisoner sued members of the Texas pardon board for adopting and enforcing a procedural rule that stated a hearing was not required in parole revocation cases when the basis for revocation was a conviction for a felony offense committed while on

parole. This rule was contrary to a state statute, which, without exception, required hearings in all parole revocation cases. The district court dismissed the prisoner's civil rights action holding that the Board of Pardons members were absolutely immune from suit.

The plaintiff in *Walter* then appealed. The Fifth Circuit held the Texas Board of Pardons had in fact violated the prisoner's due process rights because the Board of Pardons had not held the required hearing. *Id.* at 1382-1383. The court then went on to conclude that, although the Board of Pardons' members were entitled to absolute immunity when making particular decisions with regard to parole, the members were not entitled to absolute immunity for enacting a rule that stated a hearing was not required in parole revocations based on felony convictions if the plaintiff could prove that the enactment of the rule caused the Board not to hold the hearing. *Id.* at 1384-1385. The panel deciding the case stated it was relying upon the distinction drawn between administrative and adjudicative functions in the prior Fifth Circuit case of *Farrish v. Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988). 917 F.2d at 1383.

A careful review of *Walter v. Torres* will indicate that the only issue explicitly decided was whether absolute "judicial" immunity, typically afforded parole officials because of the adjudicatory nature of the parole process, should apply to the passage of a procedural rule. The panel considering the case decided absolute judicial immunity should not apply, concluding the passage of the rule was not an adjudicatory function. *Id.* at 1383-1384. The panel viewed the passage of the rule as

being "administrative" in the same sense that the challenged conduct of the official held liable in the *Farrish* case was considered to be administrative. *Id.*

However, the challenged conduct on the part of the official held liable in *Farrish* was functionally different. The challenged conduct in that case was the purported failure on the part of the Commissioner of the Department of Corrections in Mississippi to establish proper policies and procedures for ensuring that constitutional rights are not violated. 856 F.2d at 976. In *Farrish*, it is questionable whether the challenged conduct could be considered "legislative," since the case did not involve the enactment of rules having the force and effect of law pursuant to a delegation of power from the legislature.

The Fifth Circuit panel in *Walter v. Torres* does not appear to have considered the issue of whether absolute immunity commonly afforded those acting in a legislative capacity should apply. The opinion does not explicitly raise the point, and the mechanical application of the result reached in *Farrish v. Mississippi State Parole Board* further suggests it was not considered. For this reason, *Walter v. Torres* should not be relied upon as creating the conflict in the circuits claimed by the petitioner.

Further, such an expansive reading of *Walter* would appear to be at odds with other Fifth Circuit decisions such as *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) and *Hughes v. Tarrant County Texas*, 948 F.2d 918 (5th Cir. 1991). In *Hughes*, the Fifth Circuit stated generally that "legislative immunity not only protects legislators; it also protects officials fulfilling legislative functions." *Id.* at 920.

2. Granting executive department officials absolute immunity for formal rulemaking is consistent with prior cases decided by this Court, is likely only to be applied in limited numbers of cases, and is desirable from the standpoint of public policy.

The Eighth Circuit's decision in this case is consistent with prior decisions of this court, including specifically the following trilogy of cases: *Butz v. Economou*, 438 U.S. 478 (1978); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). In these cases, this Court has held the following:

(1) that executive department, and other non-elected officials, can claim either judicial or legislative absolute immunity, as the situation warrants, even though the officials are neither judges nor elected legislators [*Butz & Lake Country Estates*];

(2) that the test for determining whether an official is entitled to absolute immunity is a functional test with the focus being on the particular activity performed by the official, rather than on the status or location of the official's office [*Butz, Lake Country Estates, & Consumers Union*]; and

(3) that rulemaking is a legislative function [*Consumers Union*];

(4) that officials exercising delegated legislative authority are entitled to legislative immunity [*Lake Country Estates & Consumers Union*]; and

> (3) that non-legislators engaged in rulemaking pursuant to a delegation of legislative authority are entitled to absolute immunity [*Consumers Union*].

When these cases are considered together, there seems to be little doubt about the correctness of the Eighth Circuit's decision in this case. Judge Bork in *Jayvee Brand, Inc.* reviewed the *Butz, Lake Country Estates,* and *Consumers Union* trilogy of cases, and concluded:

> From all this it is clear that when an agency exercises quasi-legislative regulatory authority, action for money damages against agency members will not lie.

721 F.2d at 395.

Petitioner claims that rulemaking and rate-setting are "administrative" in nature; hence they are not entitled to the protection of absolute legislative immunity. However, as the Eighth Circuit pointed out below (App. at 6-8), this Court has already held that formal rulemaking is a legislative function. *See Consumers Union* at 731. The same is true for rate-setting even though rate-setting is not an issue in this case. *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 370-372 (1989); *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226 (1908). This case only involves the promulgation of formal rules from which rates would later be determined. As pointed out previously, the complained about rules were never actually applied by the North Dakota Department of Human Services to the petitioner.

Petitioner claims there is no historical basis for applying absolute legislative immunity to formal

rulemaking. However, the concern this Court has shown in recent cases for finding historical precedent for the extension of absolute immunity relates more to activity that is on the periphery of a function that the Court has already declared to be protected by absolute immunity. *E.g., Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993) (determining whether a prosecutor talking to the press traditionally was considered to be a prosecutorial function). In this case, we are not dealing with an activity that is on the periphery of what traditionally has been considered legislative activity, *e.g.*, public distribution of press releases and newsletters by a legislator, for example. *See Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992). Rather, we are dealing with conduct that this Court has already declared in the previously cited cases to be a legislative function.

Petitioner raises the specter that the Eighth Circuit's decision in this case greatly expands the scope of absolute immunity and insulates all executive rulemaking from judicial review. Petitioner bases its argument upon the fact that legislators traditionally have been afforded absolute immunity from injunctive relief, as well as, immunity from suits for money damages. Petitioner's argument, however, is seriously flawed for several reasons.

First, application of absolute legislative immunity in this situation will not insulate allegedly unconstitutional regulations from judicial review. This is because an action for declaratory and injunctive relief can be brought against the officials who are responsible for the administration of the regulations regardless of whether the particular persons who promulgated the regulations are immune from suit for injunctive relief. *E.g., Consumers*

Union at 734-737. Further, if the persons who promulgated the regulations have the dual responsibility for later administering them, any immunity from claims for equitable relief that might have attached as a result of promulgating the regulations will not apply when the person is acting in the capacity as the administrator of the regulations. *Id.* In *Consumers Union*, this Court held that the Virginia Supreme Court was absolutely immune from suit for injunctive relief, for the purely legislative activity of promulgating rules of professional responsibility, but was not immune from injunctive relief when acting as the enforcing authority for the Virginia Code of Professional Responsibility. *Id.*

Thus, even if absolute immunity were applied to bar suits for injunctive relief against those persons acting purely in a legislative capacity, it would not insulate the resulting regulations from judicial review and the granting of either declaratory or injunctive relief, as the petitioner claims. *See id; cf., New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 370-372 (1989). This is essentially what the Eighth Circuit concluded in this case when it stated the following:

> The absolute immunity we confer upon the Department officials is for their conduct of rulemaking. Suits for declaratory and injunctive relief are still available to challenge regulations.

[App. at 8].

The second reason why the petitioner's argument is flawed, and why the Eighth Circuit's decision in this case will not greatly expand the application of absolute immunity, is because in most cases there will have been some

administration or enforcement of the regulations and absolute legislative immunity will not protect executive officials from damage claims that arise in that situation. *E.g., Consumers Union* at 734-738. It is only in rare cases, such as this one, when the only complained about conduct is the passage of allegedly unconstitutional regulations, that absolute immunity will apply. The paucity of cases addressing the application of absolute legislative immunity to formal rulemaking is good evidence of the fact that this situation does not arise very often.

Further, there are legitimate policy reasons for applying absolute legislative immunity to formal rulemaking. At the rulemaking stage, it is often impossible to foresee all of the possible ramifications that far-reaching rules of general applicability, such as the ones involved in this case, might have. To expose public officials at this point to the threat of damage suits would be counterproductive and would unduly inhibit the rulemaking process. This was the conclusion of the court below. [App. at 8]. It is also one of the reasons expressed by this Court for extending absolute legislative immunity to persons exercising legislative functions. *Lake Country Estates* at 404-405.

The situation is different, however, when it comes time to actually apply the regulations to a concrete situation. At this point, the executive department officials should have a better understanding of what will be the ramifications of applying the regulations. In this situation, it is not unfair to hold them accountable for conduct that is clearly wrongful.

Finally, the Court need not decide in this case whether the grant of absolute immunity from suits for damages necessarily requires that the respondents also be deemed immune from actions for injunctive and declaratory relief. This is because there is no claim for injunctive relief in this case. However, even if there were, affording absolute immunity from claims for both damages and equitable relief would not have the disastrous implications claimed by the petitioner for the reasons previously discussed.

Furthermore, just because, historically, the scope of absolute legislative immunity for legislators includes immunity from claims for injunctive and declaratory relief does not mean this has to be the scope of absolute legislative immunity that is applied to executive department officials performing a legislative function. Absolute immunity is a common law doctrine, and certainly the courts have the power to tailor the application of the doctrine to fit the purposes for which it is being applied.

Petitioner states that there is no support for such a position. The Fifth Circuit, however, has essentially so held in *Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174-175 (5th Cir. 1991). In this case, the Fifth Circuit held that claims for injunctive and declaratory relief can be brought against state officials in their "official" capacities even though the same officials are protected by absolute legislative immunity from suits for damages brought against them in their personal capacities.

3. The second issue raised by the petitioner, as to whether rules with a particularized impact should be regarded as legislative, is not worthy of certiorari.

Petitioner argues that the complained about rules applied only to the petitioner. Hence, the petitioner argues the rules cannot be truly legislative in nature and absolute immunity should not have been applied. However, petitioner's claims in this regard are simply not correct as pointed out in the Statement of the Case set forth above. Both the district court and the Eighth Circuit below considered these same arguments and rejected them after considering the scope of the rule changes that were made, the language of the rule changes, and the administrative record. Both the district court and the Eighth Circuit concluded that the rules the petitioner now complains about, by their terms, apply to all "basic care" facilities. [App. at 6 & 17].

With regard to this second issue, the petitioner does not claim any conflict in the circuits. Rather, all that the Court would be doing by considering this issue would be second-guessing the interpretations of the rules that have been made by the district court and the Eighth Circuit. This is not an issue of national importance and is not worthy of the grant of certiorari.

Respondents would urge the Court to order the record from the court below and examine the comprehensive rule changes that were made, along with the "nursing home" rules from which the "basic care" rules were derived, before granting certiorari as to this issue. The respondents believe the Court would quickly conclude, if

it did so, that the lower courts were correct and that there is no issue here at all.

4. Even if this Court were to decide that the respondents are not entitled to absolute immunity, the judgment must be affirmed because the respondents are clearly entitled to qualified immunity.

The issue of qualified immunity was raised, briefed, and argued by the respondents in both the district court and the court of appeals, as an alternative grounds for dismissal of the action. Both the district court and the court of appeals declined to reach the issue because of the determination that the respondents are entitled to absolute immunity.

In this case, the alleged wrongfulness of the challenged conduct is by no means clearly established. In fact, if anything, the decided case law suggests that there is no constitutional infirmity with the complained about regulations.

For example, one of the regulations complained about by the petitioner provides for the recapture of excess depreciation taken prior to the effective date of the regulations in certain limited situations, such as when a facility asset is sold, or is taken out of service, as an adjustment to future rates. In a somewhat similar context, the courts of appeals have considered the constitutionality of recapture of accelerated depreciation under the federal Medicare program. For the most part, the retrospective aspects of the regulations involved in those

cases were upheld as serving a rational regulatory purpose and survived constitutional attack. *Fairfax Nursing Center, Inc. v. Califano*, 590 F.2d 1297, 1301-1302 (4th Cir. 1979); *Summit Nursing Home, Inc. v. United States*, 572 F.2d 737, 742-744 (Ct. Cl. 1978); *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080-1082 (1st Cir. 1977); *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 955-956 (5th Cir. 1977); *Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated and remanded on other grounds*, 430 U.S. 952 (1977); *but see Daughters of Miram Center for the Aged v. Mathews*, 590 F.2d 1250, 1259-1263 (3rd Cir. 1978).

The federal Medicare provisions that allowed accelerated depreciation in certain situations for calculation of provider reimbursement rates were later repealed. More recently, a number of courts of appeal have considered substantive challenges to recapture of excess depreciation regulations more closely analogous to the regulations involved in this case under the Medicare and Medicaid programs. Although the constitutionality of the regulations was not directly in issue in these cases, most of the circuit courts of appeal, including the Eighth Circuit, have upheld similar recapture regulations. *E.g., Creighton Omaha Regional Health Care v. Sullivan*, 950 F.2d 563 (8th Cir. 1991); *Hoodkroft Convalescent Center, Inc. v. State of New Hampshire, Div. of Human Services*, 879 F.2d 968 (1st Cir. 1989); *Professional Medical Care Home, Inc. v. Harris*, 644 F.2d 589 (7th Cir. 1980); *Stewards Found. v. United States*, 654 F.2d 28 (Ct. Cl. 1981); *contra, Mercy Community Hospital v. Heckler*, 781 F.2d 1552 (11th Cir. 1986).

With regard to the complained about regulations that adjusted the basis for calculating the amount of depreciation and interest expense that would be considered in determining future rates, there are at least two cases that have upheld similar regulations against constitutional attack on the same grounds alleged by the petitioner below. *E.g., Hempstead General Hospital v. Whalen,* 474 F.Supp. 398 (E.D.N.Y. 1979), *aff'd without opinion,* 622 F.2d 573 (2nd Cir. 1980); *Anco, Inc. v. State Health and Human Services Finance Commission,* 388 S.E.2d 780 (S.C. 1989).

Finally, this Court has held generally that regulatory programs of this nature can be changed without raising due process concerns as to those persons already providing services to the programs. *E.g., F.H.A. v. Darlington, Inc.,* 358 U.S. 84 (1958). More specifically, a number of cases have held that providing services to comparable programs, such as Medicare or Medicaid, on a voluntary basis does not give rise to protectable rights under the Due Process Clause to make a profit. *E.g., Livingston Care Center, Inc. v. U.S.,* 934 F.2d 719, 720-721 (6th Cir. 1991) ("Providers of health care who choose to participate in this federally sponsored program for the aged and disabled do so with no guarantee of solvency."); *Whitney v. Heckler,* 780 F.2d 963, 968-973 (11th Cir. 1986); *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dept. of Pub. Welfare,* 742 F.2d 442, 445-447 (8th Cir. 1984), *cert. denied,* 469 U.S. 1215 (1985); *Springdale Convalescent Center v. Mathews,* 545 F.2d 943, 955-956 (5th Cir. 1977); *Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger,* 543 F.2d 703, 708 (9th Cir. 1976), *vacated and remanded on other grounds,* 430 U.S. 952 (1977); *Hempstead General Hospital v. Whalen,* 474 F.Supp. 398, 411 (E.D.N.Y. 1979), *aff'd without opinion,* 622

F.2d 573 (2nd Cir. 1980). In fact, a provider's participation in these types of social programs can even be terminated without infringing upon substantive due process rights because of the lack of any protectable interest which accrues through participation in such programs. *E.g., Senape v. Constantino*, 936 F.2d 687 (2nd Cir. 1991); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175-177 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 300 (1991).

Given the foregoing, it can hardly be said that the unlawfulness of the challenged conduct, if there was any, was so clearly established that the respondents should be held personally liable for money damages. Hence, respondents are entitled to qualified immunity and a judgment of dismissal, regardless of whether or not absolute immunity is applied. *E.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES S. MILLER, JR.
ROBERT J. UDLAND*
FLECK, MATHER & STRUTZ, LTD.
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 48402
(701) 223-6585

Counsel of Record